issues whether she did or did not sign the indemnity making her liable personally. Before the trial Court can come to any certain decision in this respect, the Court may need to hear expert evidence on handwriting in addition to other evidence to be led by the plaintiffs. Apart from that there are matters surrounding the signing of the document of indemnity by the 3rd Defendant requiring close scrutiny which only a full and proper trial will help to highlight. For instance, in plaintiffs' affidavit in reply dated September 19, 1984, we eventually know that the only copy signed and attested was P-6(a) and this was discovered after confirming the matter with the attesting witness, Ho Yun Kiong. Again, if we were to refer to the attestation part of P-6(a) where the supposed signatures of 2nd and 3rd defendants appear making them liable personally by itself without further explanation, it would appear as if the 2nd and 3rd defendants signatures has been attested in front of the said Ho Yun Kiong, whereas in Ho Yun Kiong's reply dated July 30, 1984, P-17 he stated that only Chu Yun signed and Chu Yun brought the documents back home for his wife to sign and the said Ho Chun Kiong was truthful enough to say that the alleged signature of Yip My Chu was not done in his presence.

In regard to the 2nd defendant's defence it was a different matter. I accept that when the 2nd defendant did sign the indemnity, P-6(a), the first page was blank but he well understood the purpose of the indemnity and the purpose of the loan bearing in mind his standing in the business world. I believe Cheng Kam Meng when he swore in paragraph 6 of his affidavit dated September 19, 1984, that in the course of business he was acquainted with the 2nd defendant's signature and the signatures appearing in Exhibit P-3, P-6(a) and CY-3 appear to be the same. This is further strengthened by the letter of Ho Yun Kiong dated July 30, 1984 which confirmed that Chu Yun signed three copies of P-6(a), CY-2 and CY-3 not only in his presence but also in that of his wife, Madam Hing Nyuk Ching. He also confirmed that the said Chu Yun was well aware of what the documents were for and if one were to examine P-6(a) we are to find that the disputed signature of Chu Yun, if believed by the Court, making him liable personally in his personal capacity was in one document and was just below where he signed as Director of the 1st defendant company, thus lending further credence to Ho Yun Kiong's statement that the 2nd defendant did sign the indemnity letter. In spite of Ho Yun Kiong'a apparent inaccuracy in that he held out to have attested to 3rd defendant's signature in P-6(a), I believe him and I make a finding that the 2nd defendant did in fact sign the indemnity in his personal capacity as well and I therefore doubt the *bona fide* of 2nd defendant's defence.

In view of what I have stated above, I therefore order that the 2nd defendant be given leave to defend on condition that he deposit $120,260.35 as prayed within one month hereof failing which the plaintiffs are to have liberty to sign final judgment. In respect of 3rd defendant, however, she is given unconditional leave to defend for reasons I have given. I order that the cost of the present Order 14 application in respect of the 2nd defendant to plaintiffs to be taxed as usual and no order as to cost in respect of 3rd defendant.

Order accordingly.

Solicitors : *Skinner Lind Robertson Pang & Willie; Yap & Chin.*

NG AH KWAY v. TAI KIT ENTERPRISE SDN. BHD.

[O.C.J. (Shankar J.) December 9, 1984]

[Johore Bahru – Companies Winding up No. 30 of 1984]

Company Law – Company unable to pay its debts – Petition to the court for winding up – Petitioner to show debt is undisputed and company is unable to pay – Companies Act, 1965, s. 218.

In this case, the respondent, Tai Kit Enterprise Sdn. Bhd., a housing developer, entered into a contract with the petitioner, a building contractor for constructing certain housing units for the company. The work executed was to be certified by the architect from time to time for payment. The architect had issued certificates estimating the total value of work executed at $626,000. The company made part payment to the extent of $304,538. Subsequently it was agreed by both the parties to terminate the contract. The company contested the certificates of the architect and it was agreed that a quantity surveyor be appointed to estimate the value of the work so far executed. The surveyor estimated the value to be only $396,036. The contractor further alleged that a sum of $200,000 in cash was paid to the company through one of its directors, Mr. S.I. Rajah. The company denied having ever received this amount.

The contractor then served a statutory notice under section 218 of the Companies Act demanding payment for the works executed as well for $200,000 alleged to have been paid to the company. The company disputed both the claims. The contractor then filed a petition for winding up

of the company on the ground that the company was unable to pay its debts. No other creditor joined the petition while the petition was opposed by number of shareholders.

Held: (1) a petition for winding up of a company is a serious matter as it affects the reputation of the company;

(2) the debt must be liquidated and undisputed;

(3) the company must be insolvent in the sense relevant to winding up;

(4) the petition for winding up cannot be resorted to to settle disputed debts. The proper course for the petitioner is to file a civil suit for determining the disputed claims. The petition was dismissed.

Cases referred to:-

(1) *Pakir Mohideen* v. *K. Ismail Ghani Rawther & Co.* [1963] M.L.J. 294.
(2) *Sun Soon Heng Coach Works Sdn. Bhd.* v. *Nima Travels Sdn. Bhd.*, J.B. Companies Winding-up No. 8 of 1984.
(3) *Re Tweeds Garages* [1962] 1 All E.R. 12.
(4) *Re Welsh Brick Industries* [1946] 2 All E.R. 197.
(5) *Re Sunshine Securities (Pte.) Ltd.* [1978] 1 M.L.J. 57.
(6) *Re Lymphe Investments Ltd.* [1972] 1 W.L.R. 523.
(7) *Mann & Goldstein* [1968] 1 W.L.R. 1091.
(8) *Re Gold Hill Mines* (1882) 23 Ch. D. 210.

COMPANIES WINDING UP.

Ong Ban Chai for petitioner/creditor.
S. Sagadeva for the Respondents/Debtors.
Wong Thiam Seng (Assistant Official Assignee) for the Offical Receiver.

Cur. Adv. Vult.

Shankar J. : This is an application by the Petitioner for a Winding up Order of the Respondent Company.

The Petitioner is a building contractor. On or about October 24, 1983 the Petitioner entered into a formal building contract with the Respondents. The Petitioner is referred to in this contract as the contractor and will be referred to in this Judgment as such. The Respondent is referred to in the contract as the employer but will be referred to herein as the Company. The contract is in the form issued under sanction of Pertubuhan Arkitek Malaysia and the Institute of Surveyors. It is of the series described as "private edition without quantities." The Articles of Agreement and the conditions are somewhat complex running into some 20 pages of closely printed material.

But so far as it is relevant to the present application I need only state that under this contract the contractor was to build 147 units of mixed housing development at Lot No. 101 Mukim of Senai, Kulai, Daerah Johor Bahru at a cost of $5,724,881.40. The architect under the contract was Kumpulan Sivik Arkitek, 3rd Floor, TWU Building, Petaling Jaya, Selangor.

The works under the contract were to commence on or about November 2, 1983 and completed on May 2, 1985.

To put it in a general way, the arrangement appears to have been for the architect to issue certificates for the work which had been completed at various stages so as to permit the payment of what is loosely referred to as progress payments. The contract provided for 10% to be the percentage of the certifying value retained.

On October 22, 1983 the contractor appears to have made out a voucher for the payment to the Company of a sum of $50,000/- said to be "payment for advance." The voucher further states that this payment was by way of a Bank Bumiputra (Malaysia) Berhad cash cheque No. 038-366. The voucher has a signature above the printed words "Received by." This signature is said to be that of Mr. S.I. Rajah.

On October 25, 1983 the contractor made out another voucher. This voucher states that $150,000/- was advanced to the Company and this voucher further states that the payment was by way of BBMB cheque Nos. 038-369 and 038-370.

Again the voucher purports to have the signature of Mr. S.I. Rajah as having received the money.

Thereafter it would appear that the works proceeded and the architect issued certificates for payment. I have not seen Certificates Nos. 1 and 2. On March 9, 1984 the architects issued a certificate estimating the total value of the works executed at $626,000/-. Less the retention amount of $62,600/- the total amount payable to them is said to be $563,400/- which less the amount previously certified of $461,655.09, made the amount authorised for the payment by this certificate as $101,744.91.

By that date it is apparent that there were severe problems between the parties.

The Company was represented by M/S Wong and Dass. The contractor was represented by M/S Wong and Liew. The architect Kumpulan Sivik Arkitek appears to be the style under which Mr. Pulendran Ponniah practises.

On March 19, 1984 there was a conference at the work-site by the parties at which they appear to have come to a tentative agreement on the terms on which they were to disengage and go their separate ways. These tentative terms are the subject of a letter dated March 19, 1984 which was sent by the Company's Solicitor to the contractor's solicitor. It was received by the contractor's solicitor the following day as appears from the rubber stamp on the photocopy of this document which has been submitted in evidence.

Briefly this document provided that the building contract was to be terminated subject to the following terms:

1. The taking into account of a sum of M$304,538.84 already paid by the Company to the contractor by way of progress payments.
2. The building contract to be determined as from the date that the contractor receives $130,000/- from the Company as to which a cheque had been issued.
3. Without prejudice to accrued rights the contractor was to cease work at the site and
   a. vacate the same
   b. the Company was to pay $630,000/- as full and final settlement of the contractor's entire claim in instalments commencing from March 15, 1984 and ending June 15, 1984.
4. The Directors of the Company were to guarantee these instalments.

There were other terms which it is not necessary to set out in detail here.

But this much has to be said. The letter clearly states in so many words that all the various terms which it contained were to be included into a written agreement which was to be executed by the contractor and then returned to the Company for execution. This was to be done by the contractor's solicitor after the cheque of $130,000/- had been cashed and it was further provided that none of the other cheques which had been given in advance for the satisfaction of the instalment payments under the agreement were to be banked until the formal agreement had been executed.

This formal agreement never materialised because shortly after the letter of March 19, 1984 it appears that the parties were again at each other's throats.

The full details of this confrontation are not clear to me but it would seem that somebody took the view that the contractor had grossly overcharged for the work done resulting in an overvaluation of the work done. The cheque for the $130,000/- was not met when it was presented for payment.

The Company then challenged the architect's certificate estimating the value of the works at $626,000/-. They gave formal notice to Mr. Pulendran Ponniah of this challenge by a letter dated March 30, 1984.

Mr. Pulendran Ponniah's response was to say that if his estimate of the works was challenged then a quantity surveyor should be employed to verify the actual amount and advised that the matter be referred to arbitration as stipulated in the building contract.

The Company then appointed an independent property consultant M/S Ernest Chong PTL to give a report and valuation of the works which had been completed by the contractor. This report and valuation which is in writing and dated July 16, 1984 states that far from the completed works being worth $626,000/- they were only worth $396,035.75. Based on this the Company was stating that there were serious grounds for challenging the *bona fide* of the architect's certificates.

On June 1, 1984 the Contractor filed a suit in the Commercial Division of the High Court in KL under Suit No. C1697 of 1984. After setting out the matters of inducement the contractor claimed that the Architect had certified 3 payments to the value of $626,000/-, that the defendants had paid $280,000/- towards settlement and this left a balance due to them of $326,000/- for the works. In addition they claimed that they had advanced $200,000/- to the Company making the total debt due to them $576,000/-.

On June 26, 1984 the Contractor applied by way of an *ex parte* Summons in Chambers for an injunction to restrain the Company, its servants or agents from entering the worksite. The affidavit in support sets out the grounds on which the injunction was sought.

Briefly it boils down to an allegation that amicable negotiations had failed, violent incidents had taken place in the site and that if the contractor was not allowed to retain an unfettered possession of the site their rights would be severely jeopardized.

On June 27, 1984 the injunction was granted subject to the usual undertaking by the contractor through his solicitors as to damages.

On June 29, 1984 this injunction was dissolved with liberty to the contractor to apply *inter parte*. On July 6, 1984 the Company applied by way of a Summons-in-Chambers for all proceedings to be stayed, and for reference of the disputes between the parties to arbitration as provided by the arbitration clause in the Building Contract which is Clause 34. The Summons-in-Chambers was fixed for hearing on July 23, 1984.

Then the contractor changed his solicitors to M/S Ong Ban Chai & Co. who went on record. It is claimed by them that on July 13, 1984 they filed in the Registry of the Kuala Lumpur High Court a notice of discontinuance of the Civil Suit C1697 of 1984 and by way of proof a handwritten copy of the entry recorded in the Kuala Lumpur Civil Registry has been submitted. But for some curious reason it appears that this discontinuance did not come to the notice of the Judge and on July 23, 1984 the High Court in Kuala Lumpur made an order whereby all further proceedings in the said suit were stayed pursuant to section 6 of the Arbitration Act 1952. In the last affidavit filed by Mr. S.I. Rajah is exhibited a sealed copy of this Order.

By this stage the quantity surveyor's report obtained by the Company had become available and seems to have been sent to the architect with a covering letter dated July 20, 1984. The architect Mr. Pulendran Ponniah refused to accept this valuation and after some recrimination suggested that the entire matter should be referred to arbitration.

What arises out of all these material is that by this stage the Company, the architect, and the contractor were all at odds as to what sum was properly payable and the architect who had the conduct of the building contract suggested arbitration and the Civil Suit had been stayed for that very purpose.

However, the new solicitors of the contractor had other ideas. On July 18, 1984 they sent a notice pursuant to section 218 of the Companies Act 1965 to the Company requiring it to pay to them as the contractor's solicitors $576,000/- within 21 days.

The 21-day ultimatum expired on August 8, 1984.

On July 24, 1984 the Company sent a reply to this demand disputing the debt.

On August 11, the contractor's new solicitors filed a petition for the winding up of the Company in this Court.

Now Rule 24 of the Companies (Winding-up) Rules provides:

> "24. Every petition shall be advertised in Form 4 seven clear days or such longer time as the Court may direct before the hearing, as follows:
>
> (a) once in the Gazette and twice at least in two local newspapers circulating in Malaysia or in such other newspapers as the Court may direct;"

On August 15, 1984 the contractor's new solicitors filed a Summons-in-Chambers *ex parte* for the petition to be advertised in accordance with Rule 24 with a supporting affidavit asking for time to be abridged because the seven-day period stipulated in Rule 24 was too short to be complied with.

The Order permitting advertisement forthwith was extracted on August 30, 1984.

It must be pointed out that after the filing of the petition it had been endorsed for hearing on November 10, 1984.

The petition was served on the Company on August 25, 1984. On September 1 and 2, 1984 the petition was advertised in the *Star*. On September 4 and 5, 1984 it was advertised in the *Sin Chew Jit Poh*. On September 13, it was also gazetted in the Government *Gazette*.

The Company claims that these advertisements had catastrophic results on its business. On September 6, 1984 with a solicitor's certificate of urgency the Company through its solicitors filed several notices from the various shareholders of the Company giving notice of intention to oppose the petition. The Company also filed on that day a Summons to strike out, stay or dismiss the winding up petition presented and for a restraining order preventing the petitioner from placing any further advertisement in the media.

In the supporting affidavit filed by Mr. S.I. Rajah it was averred that the debts claimed by the contractor were disputed and supporting evidence was provided of the dispute in the form of the building contract, the quantity surveyor's report and the sums already paid towards the claim.

It was alleged in this affidavit that the winding up petition had been presented maliciously and with the view to bringing pressure to bear on the Company to harass them into settling the disputed claim.

The Summons-in-Chambers only came on for hearing on September 8, 1984.

On that day a Consent Order was made that all further proceedings be stayed until the Company's application *inter alia* to set aside was heard and that application was adjourned to September 29, 1984.

On September 29, 1984 when the matter came up before me in Open Court the solicitors for the Company expressed their grave concern at the damage that had been caused to them by the advertisement and as a price for the petitioners not taking further steps in the action except to obtain the Registrar's Certificate within Rule 32 they expressed their willingness to deposit $52,000/- in Court in the joint names of the solicitors for the respective parties to await the outcome of the hearing of their application and the petition which was fixed for disposal on November 10, 1984.

It should be noted that this sum of $52,000/- was the difference which was due to the petitioner on the respondent's calculations taking into account the retention sums.

It did not take into account any counterclaims which the Company felt entitled to make against the contractor.

Thereafter further affidavits were filed and the matter was argued by counsel for both parties not on November 10, 1984 but on December 3, 1984. This change in dates was due to administrative reasons unconnected with any act on the part of the parties.

At the hearing various authorities were cited by both parties.

In a nutshell the claim for the petitioner contractor was that it did not really matter that the precise debt due from the Company had not been quantified. All that the contractor had to establish according to Mr. Ong Ban Chai was that the Company was in debt and was unable to pay its debts. In this context it was submitted that once the Company had defaulted in complying with the statutory demand for $576,000/-, the Court should deem that the Company was unable to pay its debts and make the winding up order accordingly.

As to the Order for stay of proceedings pending arbitration which had been made by the High Court in Kuala Lumpur the argument for the petitioner was that the Order in question was null and void and of no effect because the Registry had already accepted for filing a notice of discontinuance of the action a few days before.

Even if the debt of $376,000/- was disputed it was submitted that there was the $200,000/- advanced to the Company which had to be taken into account.

It was also contended that there were numerous other creditors of the Company whose claims had not been satisfied but no satisfactory response has been forthcoming from the petitioner's solicitors as to why there are no other creditors who are supporting this petition.

On the other hand it was submitted for the Company that the Order of the Court staying the proceedings in the Civil Suit was a valid and subsisting Order issued under the seal of the Court and that as long as it remained in existence it was a valid order and had to be given effect until such time as it was set aside.

It was further contended that there was a very serious dispute as to the precise sum, if any, owed to the contractor. The disparity between the amount stated in the architect's certificates, which was the basis of the contractor's claim and the valuation by the Company's quantity surveyor was so great that until the matter had been properly resolved it could not be predicted with any confidence how much was owed and by whom.

As to the allegation that the Court should deem that the Company was unable to pay its debts the Company's solicitor pointed out to a further valuation showing that this Company had very substantial assets to the tune of about $2.7 million and could not be said to be insolvent.

Whilst I was reasonably satisfied at this stage of the proceedings that there was a real dispute as to what, if any, sum was due by way of the value of finished works, I was still in doubt as to the position regarding the $200,000/- which were the subject matter of the vouchers earlier referred to.

A bare denial carries no weight in this Court.

(See *Pakir Mohideen* v. *K. Ismail Ghani Rawther & Co.*[1]).

So I invited the parties to supply further information about this so-called receipt of $200,000/-. After all even on the contractor's own averments the money was not paid to the Company but to one of its directors and that director Mr. S. I. Rajah had filed an affidavit denying receipt of the money (but not denying his signature on the vouchers) and made a statement through his counsel in Open Court that he was prepared to give evidence on oath if necessary that he never had this money.

I therefore adjourned the matter for further consideration to December 8, 1984. The parties were invited to file their affidavits dealing with this claim of $200,000/- and the reason why the cheque for $130,000/- was not met.

These affidavits have now come before the Court.

For the Company, Mr. S. I. Rajah has averred:-

1. That in response to the contractor's solicitor's statutory letter dated July 18, 1984 the Company had replied on July 24, 1984 to M/S Ong Ban Chai & Co. disputing the debt and pointing out that the matter was *sub judice* and had been referred to arbitration and that any attempt to resort to a winding up petition was at the risk of the contractor.

2. As for the $130,000/- it has been alleged that payment was stopped on the basis that the contractor had over-claimed and as to the $200,000/- Mr. S.I. Rajah claims that the cheques did not go to him but to one Goh Kwee Leng @ Mohd. Alfikir bin Abdullah, who was the contractor's broker and paid for his brokerage commission and expenses in this way.

For the Petitioner 2 affidavits were filed on the date of the continued hearing on December 8, 1984. Mr. Ng Ah Kway has averred that Mr. S.I. Rajah said that the money was needed by the Company. He therefore went to Mr. S.I. Rajah's office on the November 22, 1983 and gave him a cash cheque for $50,000/- as part-advance payment. On October 25, 1983 Mr. Ng Ah Kway gave Mr. S.I. Rajah 2 further cheques for $75,000/- each at the office of the architect Mr. Pulendran Ponniah in the presence of the architect and Mr. Goh Kwee Leng.

Mr. Ng Ah Kway produces his bank statements to show that these cheques were cashed.

As to any liability to the broker Goh Kwee Leng he avers that he only had to pay him 1% of the tender value and implies that no part of the payment in any way related to this liability. Finally he sought to extract from the proposed settlement letter dated March 19, 1984 some kind of implied admission by the Company that the last instalment of $200,000/- to satisfy the total amount of $630,000/- for the settlement was in fact related to the same $200,000/- which he had advanced.

Mr Goh Kwee Leng in his affidavit claims that he was appointed by the Company to be its financial manager/advisor and acted as such.

He further claims that he personally cashed the cheques for the $200,000/- and gave the cash to Mr. S.I. Rajah out of which $6,000/- in cash was given back to him as part-payment of his expenses.

Mr. Ong Ban Chai's claim is that since Mr. S.I. Rajah was a director of the Company his relationship to the Company was that of agent and principal and I must therefore infer that the full sum of the $200,000/- went to the Company and they are consequently indebted to the petitioner for the amount.

But despite my repeated requests no receipt whatsoever has been produced from the Company in favour of the petitioner for this money. Furthermore despite the Court's invitations neither party wished to explain why, if it was desired to make an advance of $200,000/- to the Company, a cheque could not simply have been issued to the Company. One does not deal with such large sums of money in cash unless there is a very good reason. But what that reason was none of the parties wished to disclose. The entire transaction smacks of suspicion and irregularity and cries out for an enquiry as to whether something nefarious was not intended by one or more of the persons involved in the transaction. So far as the Company is concerned counsel informed the Court from the Bar Table that he had been instructed by Mr. S.I. Rajah to state that the relevant averments in the petitioner's affidavits to the effect that he, Mr. S.I. Rajah, received the money in cash were all denied.

In the result the Court was left with some highly unsatisfactory evidence which only went to make clear the plain fact that this alleged debt of

$200,000/- from the Company to the petitioner was also disputed.

It is now necessary to deal with the law on the matter.

In *Sun Soon Heng Coach Works Sdn. Bhd. and Nima Travels Sdn. Bhd.*[2] I delivered judgment on most of the points which have arisen for decision in this case. The petitioner in that case was represented by the same firm of solicitors as for the petitioner in this case.

But my decision was not cited to me in the course of the argument and it seems desirable therefore that I should once again, and in no uncertain terms, reiterate my views on these matters and on the cases which have been cited to me as authority for justifying the actions of the petitioner in this matter.

In *Buckley* on the Companies Act 1984, 13th edition at page 451 it is stated:

"Great damage may obviously be done to a solvent company by a winding-up petition presented by an unreasonable creditor, whose debt the company are able and willing to pay if established, but to whom they bona fide believe they are not indebted. In such a case, on writ issued by the company, an injunction will be granted to restrain the creditor from presenting a petition. If a petition has been presented which the Court finds to be an abuse of process, the Court may on motion stay all proceedings under it or dismiss it."

Re Tweeds Garages Ltd.[3] is not authority for the proposition that a winding up petition can be made regardless of any certainty as to the amount owed. A close perusal of that case will show that the company was at all material times heavily indebted to the petitioners although the exact amount of the indebtedness was disputed. The scale of the debt in comparison to the amount disputed which the Court had in mind is set out at page 124. Plowman J. said:

"If I may refer to an example which I suggested in the course of argument, suppose that a creditor obtains judgment against a company for £10,000 and after the date of the judgment something is paid off. There is a genuine *bona fide* dispute whether the sum paid off is £10 or £20 The creditor then presents a petition to have the company wound up. Is the company to be entitled to say: 'It is not disputed that you are a creditor but the amount of your debt is disputed and you are not, therefore, entitled to an order?' I think not."

The company must be insolvent in the sense relevant to a winding up. I take this to mean that in a real sense the magnitude of the company's admitted debt must be such as to make of academic interest the other debts they dispute. That is not the case here.

Re Welsh Brick Industries[7] was relied upon to support the submission that even if the Court order staying the civil suit pending reference to arbitration was valid, it did not stop the contractor here from going in for a winding up. In that case unconditional leave to defend had been granted but on the winding up proceedings it was held that it was open for the court to consider afresh on the evidence presented to it whether or not there was a *bona fide* dispute and the fact that leave had been granted on an Order 14 application did not preclude the Judge in the winding up proceedings from finding as a fact that there was no *bona fide* dispute as to the debt.

Re Sunshine Securities (Pte.) Ltd.[5] was also cited to support the submission that the letter dated March 19, 1984 written by the company's solicitor should be taken as a clear admission of liability to show the magnitude of the company's indebtedness and to support a finding that this was a case where it was more merciful for the company to be wound up rather than to allow it to continue. But in that case there was a clear and unequivocal admission of liability on the part of the company which had sought for time to pay the debt. The company had failed to pay or to give security for the debt for which a statutory demand had been made and the court found that it was insolvent and may be wound up.

Here however the facts are very different. By the date on which the statutory demand was made there was the clearest evidence of a very substantial and serious dispute between the parties. Even the architect himself was requesting that the dispute be referred to arbitration in accordance with the terms of the building contract.

Consequently I find myself unable to be assisted by the cases cited by the petitioner.

For the respondent company *In Re Lympne Investments Ltd.*[6] was cited to show that the statutory demand does not create a presumption which is unrebuttable. It was on the evidence before the Court that a decision should be made as to whether the company was to be deemed to be unable to pay its debts.

In this context *Mann* v. *Goldstein*[7] and *Re Gold Hill Mines*[8] are good examples of cases where a winding up petition was refused on the ground that the debt was disputed on substantial grounds and the circumstances in which the Court would hold that the presentation of a petition was an abuse of process and either restrain the petitioners or dismiss the petition.

It is unnecessary for me to go through the other authorities which have been cited by the Counsel for the respondent company. All of them are useful examples of the application of the same principle namely that whether there is a *bona fide* dispute is an issue of fact to be decided on the evidence before the Court.

The claim by the petitioner falls into 2 compartments.

$376,000/- is what the petitioner claims as being still due and owing by way of the value for work done. This claim has its basis in the 3 payments certified Mr. Pulendran Ponniah the architect for the total sum of $626,000/-. That there is a *bona fide* and substantial dispute as to whether this sum is owing is clearly highlighted by the evidence which the company has produced to the effect that the total value of the work done is not $626,000/- but only an estimated $396,035.75. To add to this massive disparity is the other problem which arises from the alleged removal from the work site by the contractor of all the building materials which were on the site at the time the disputes arose in March 1983. If this is taken into account it is contended that a conclusion may well be justified that there is nothing due and owing to the contractor at all.

On October 26, 1984 the Chairman of the Arbitration Panel of the Malaysian Institute of Architects had written that the company had requested them to nominate an arbitration which they would do if no objections were received within 2 weeks.

The panel aforesaid is eminently qualified to deal with disputes relating to the proper valuation to be placed on semi-completed building works.

What is more the Order of the High Court in Kuala Lumpur hereinbefore referred to is still subsisting and in all the circumstances it would appear that until this aspect of the claim for work done has been made the subject of a judgment debt it cannot be made the subject of a winding up petition.

As for the $200,000/- there is also a dispute. Mr. Ong Ban Chai has asked me to hold on the balance of probabilities that this money went to the company. I regret to say that the reticence of all concerned to identify the pocket into which this money was actually paid leaves this Court with no option but to hold that it must take cognizance of the denial of Mr. S.I. Rajah that he received the money. Even if the money was channelled through his hands or with his connivance into the pocket of some third party, the fact remains that no evidence has been placed before the Court to show that the money ended up in the company's coffers.

So the petitioner must be left to sue the compay and Mr. S.I. Rajah so that this claim is also made the subject of a judgment debt before it can be proceeded with on a winding up petition.

With all his persuasive abilities Mr. Ong Ban Chai for the petitioner sought to convince the Court that this was a case in which there was a real danger that the remaining assets of the company may evaporate to the jeopardy of its creditors and that the size of the company's overdraft taken together with its indebtedness to the petitioner would make it more merciful for a winding up order to be made.

But with respect to Mr. Ong Ban Chai, the Court's response is that since the claim for $200,000/- is one for a straightforward loan it can easily be made the subject of a civil action supported with an Order 14 application if indeed the matter was so simple. And the fears of creditors being deprived of the fruits of ligitation by evasive action is really a proper subject for application under section 19 of the Debtors Act 1957.

In conclusion I would say that this winding up petition appears to have been the genesis of the petitioner's frustration at the law's delays and his desire for speedy relief in the shape of a winding up order.

But on all the facts before me I must hold that the presentation of the petition was calculated to harass the company. There is plenty of material before me also to suggest that the company was not without blame in bringing about the petitioner's wrath.

In all the circumstances this petition is dismiss-

ed. Consequently the Order which I made on September 29, 1984 for the respondent to deposit $52,000/– is set aside. In normal circumstances costs would have followed the event but taking into the account the conduct of both parties in this matter, it is my view that there should be no order as to costs.

Petition dismissed.

Solicitors : *Ong Ban Chai & Co.; Moses & Saga.*

RE COLISEUM STAND CAR SERVICE LTD.; ABDUL KHALIK v. MOHAMED JEE & ORS.

[O.C.J. (Zakaria Yatim J.) February 13, 1985]

[Kuala Lumpur – Originating Motion No. 9 of 1967]

Company Law – Oppression of minority – Majority shareholder ordered to transfer part of his holdings to minority shareholders – Majority shareholder getting excessive payments from the company – Excess amount to be adjusted against price of shares transferred to minority – Companies Act, 1965, s. 181.

In this case Mohamed Jee (since deceased) held 10,909 shares in Coliseum Stand Car Services Limited and was a majority shareholder in the Company. There were two other shareholders with 1364 and 2727 shares respectively. An application by way of Originating Motion under section 181 of the Companies Act, 1965 was moved by the minority shareholders and in *Re Coliseum Stand Car Service Ltd.*[1] the High Court held that the majority shareholder had conducted the affairs of the company without proper regard to minority interest. He ordered the transfer of 4800 shares from the majority shareholder to minority shareholders jointly so as to reduce the voting power of the majority shareholder. He also ordered that an accountant be appointed to determine the value of the shares to be transferred to minority shareholders. The accountant's report was completed on November 18, 1982. The accountant fixed the price of one share at $4.68. The applicants then asked the court to set off the purchase price of the shares against all sums improperly obtained by the majority shareholder which was calculated as $131,228.

Held: the transfer of shares to the minority shareholders should be effected without any payment to the first respondent, the majority shareholder.

Case referred to:

(1) *Re Coliseum Stand Car Service Ltd.* [1972] 1 M.L.J. 109.

ORIGINATING MOTION.

S.D.K. Peddie for the applicant.

V.K. Palasuntharam for substituted first respondent.

Dulip Singh for the second respondent.

Cur. Adv. Vult.

Zakaria Yatim J. : This is an application by way of Originating Motion under section 181 of the Companies Act, 1965. The application was heard by Abdul Hamid J., as he then was. After considering the evidence contained in the affidavits and after hearing the oral evidence of the applicant and a witness called by the first respondent, the learned Judge made the following order:

"1. That 4,800 shares out of the 10,909 shares registered in the names of the First respondent (now deceased) be purchased jointly by the applicant and the representatives of the First Respondent and the Second Respondent from the Estate of the First Respondent;

2. That three Certificates of 1,600 shares each be issued by the Third Respondent abovenamed in the joint names of the Applicant, the Estate of the First Respondent and the Second Respondent covering the said 4,800 shares and that the Applicant be first entered on the Register as senior shareholder in respect of the First of such Certificates, that the Estate of the First Respondent be first entered on the Register as senior shareholder in respect of the Second of such Certificates and that the Second Respondent be first entered on the Register as senior shareholder in respect of the Third of such Certificates;

3. That an Accountant be appointed forthwith by the Senior Assistant Registrar to prepare an up-to-date statement of account of the company's assets and liabilities and to value the shares in the Third Respondent and to assess the purchase price payable for the abovementioned 4,800 shares;

4. That the Accountant so appointed as aforesaid do report to the Senior Assistant Registrar in respect of the value of the shares in the Third Respondent and the purchase price to be paid for the abovementioned 4,800 shares within a period of six (6) weeks from the date of his appointment."

The learned Judge postponed further consideration of the prayers contained in the Motion until after the completion of the Accountant's report. The report of the accountant, Nordin Baharuddin was completed on November 18, 1982.

The facts of the case are clearly set out in the judgment of the learned Judge in *Re Coliseum Stand Car Service Ltd.*[1] The applicant and the second respondent were minority shareholders of a company known as Coliseum Stand Car Service